

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-2155

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
MACIO ENNIS, :

Petitioner-Appellant, :

-against- :

E. LeFEVRE, Superintendent, Clinton Cor-:
rectional Facility, Dannemora, New York,

Respondent-Appellee. :
-----X

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Costantino, J.) dated October 12, 1976 denying a petition for a writ of habeas corpus. On November 17, 1976, the District Court issued a certificate of probable cause limited to that portion of the Court's decision dealing with the absence of the Wade hearing minutes from the Record on Appeal.

Question Presented

Has appellant exhausted available state remedies on his contention that the omission of the Wade hearing minutes from the record on the direct appeal deprived him of due process?

Prior Proceedings

On August 19, 1974 at a Term of the Supreme Court, Kings County (Koota, J.) appellant was sentenced to imprisonment for a term of 5 to 15 years after being convicted by the verdict of a jury of the crime of kidnapping in the second degree. The Appellate Division, Second Department modified the conviction by reducing it to one of unlawful imprisonment in the first degree and as so modified affirmed the judgment of conviction; reversed the judgment as to the sentence and remanded the case to Trial Term for resentencing. People v. Ennis, 50 A D 2d 935. Thereafter, appellant was resentenced to a term of four years. Leave to appeal to the New York Court of Appeals was denied.

Concerning the crime, the Appellate Division noted the following: "Defendant came up behind his victim in her building's laundry room, put a razor to her throat, and forced her to accompany him to the incinerator room next to the

laundry room. He ordered her to remove her clothing but the building's superintendent walked into the room while she was in the process of removing her clothing, whereupon defendant fled." People v. Ennis, supra.

Prior to the perfection of the appeal to the Appellate Division, the complete minutes of the trial were on file except that the minutes of the Wade hearing had not been transcribed but were available for transcription.

ARGUMENT

APPELLANT HAS FAILED TO EXHAUST AVAILABLE STATE REMEDIES ON HIS CONTENTION THAT THE OMISSION OF THE WADE HEARING MINUTES FROM THE RECORD ON THE DIRECT APPEAL DEPRIVED HIM OF DUE PROCESS; IN ANY CASE THERE IS NO MERIT IN THE CONTENTION.

Appellant contends that the State refused to provide the transcript of the Wade hearing for his direct appeal. Those minutes should have been transcribed and on file. However, as the District Court noted, there is nothing to indicate that petitioner was denied access to the minutes by any action on the part of the State. At most the record supports the conclusion that when the stenographer transcribed the minutes of trial, he did not realize that he was also required to transcribe the minutes of the Wade hearing.

The missing minutes were available for transcription, and appellant's counsel could have requested that they be transcribed at government expense. As the District Court noted the minutes were not requested by counsel. Apparently, he did not consider them necessary for arguing the appeal.

In short, the record supports the conclusion that appellate counsel had reasonable opportunity to raise in the Appellate Division, whatever merit inhered in the appeal. United States ex rel. Garcia v. Martin, 271 F. 2d 298, 301 (2d Cir. 1959). He had adequate opportunity to present Ennis' claims United States v. MacCollom, 426 U.S. 317, 324 (1976); Ross v. Moffitt, 417 U.S. 600, 616 (1974).

Moreover, trial counsel made no attempt on cross-examination to challenge the in court identification on the ground of suggestiveness of pre-trial identification procedures. Apparently after hearing the evidence elicited at the Wade hearing he did not believe that such a challenge would help Ennis. Similarly, on the direct appeal appellate counsel made no claim that Ennis was deprived of constitutional rights by a suggestive pre-trial identification procedure. Further, as the District Court noted, there were no

allegations in the petition as to how appellant was prejudiced by the omission of the minutes from the record. Apparently, the minutes of the Wade hearing were not needed to vindicate legal rights. United States ex rel. Cadogen v. LaVallee, 428 F. 2d 165 (2d Cir. 1970), cert. den. 401 U.S. 914; Leslie v. Matzkin, 450 F. 2d 310, 312 (2d Cir. 1971), cert. den. 406 U.S. 932.

Appellant contends that the alleged refusal of the State to provide the transcript of the Wade hearing for the direct appeal denied him due process. As shown above, appellate counsel had adequate opportunity to raise whatever merit pertained to the appeal and apparently the missing minutes were not needed. Moreover, in Ennis' supplementary brief submitted on the direct appeal he merely contended that he could not effect his appeal properly pursuant to CPL § 460.70(3) because of missing minutes. He did not make any claim that the omission of the Wade hearing minutes denied him due process. This claim of constitutional deprivation has never been presented to the state courts. United States ex rel. Garcia v. Martin, supra, 271 F. 2d 298, 300 (2d Cir. 1959); United States ex rel. Ellington v. Conboy, 459 F. 2d 76, 78 (2d Cir. 1972). The constitutional issue which appellant seeks to raise has not been fairly presented to the state courts. United States

ex rel. Johnson v. Vincent, 507 F. 2d 1309, 1313 (2d Cir. 1974); cert. den. 420 U.S. 994; United States ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir. 1974); United States ex rel. Rogers v. LaVallee, 463 F. 2d 185, 197 (2d Cir. 1972); United States ex rel. Curtis v. Warden, 463 F. 2d 84, 87 (2d Cir. 1972).

Appellant contends that he was denied effective assistance of counsel because appellate counsel did not obtain the missing minutes of the Wade hearing. As stated above, there are no allegations in the petition as to how appellant was prejudiced by the omission of the minutes. In any case, it does not appear that the contention has ever been presented to the state courts. With respect to a claim of ineffectiveness of appellate representation a state post conviction remedy is available. United States ex rel. Ellington v. Conboy, supra, 459 F. 2d 76, 78 (2d Cir. 1972).

In fact appellate's counsel on the direct appeal argued competently for reversal. See Hayward v. Stone, 527 F. 2d 256 (9th Cir. 1975). Appellant's contention to the contrary is frivolous. The competence of appellate counsel's

advocacy is obvious from his success in convincing the Appellate Division to reduce the conviction from kidnapping in the second degree to unlawful imprisonment in the first degree (and in convincing the dissenting judge to vote to dismiss the indictment altogether).*

CONCLUSION

THE ORDER APPEALED FROM
SHOULD BE AFFIRMED.

Dated: New York, New York
March 8, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BURTON HERMAN
Assistant Attorney General
of Counsel

* Appellant's pending motion for a certificate of probable cause as to the issue of whether he was denied the effective assistance of appellate counsel should therefore be denied.

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellee
herein. On the 8th day of March , 1977 , she
served the annexed upon the following named person :

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, N.Y. 10007

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that purpose.

Bernadette Merlino

Sworn to before me this
8th day of March , 1977

Burton Herman
Assistant Attorney General
of the State of New York